IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRENCE KEMAAL DIXON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86028

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of child abuse and one count of child abuse, neglect, or endangerment with substantial bodily harm. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

Sufficient evidence supports the convictions

Appellant Terrance Dixon argues that the State did not present sufficient evidence to support his convictions on Count 1, child abuse, for causing bruising to A.D.'s ears, and Count 3, child abuse, neglect, or endangerment with substantial bodily harm for neglecting to seek medical treatment for A.D after she suffered a serious head injury. We disagree and conclude that the jury was presented with sufficient evidence to find Dixon guilty of both crimes.

First, as to Count 1, Dixon argues that there was insufficient evidence presented to show that the bruises on A.D.'s ears arose from abuse or neglect or that A.D. suffered physical pain or permanent or temporary disfigurement, pursuant to NRS 200.508(1). In March of 2014, while A.D. was in Dixon's custody, a care worker at A.D.'s daycare noticed bruises on A.D.'s ears and took photos of the injuries. Those photos were presented to the jury. At trial, the care worker testified that when she asked about the bruises, Dixon told her that the injury occurred from biking in the wind.

The care worker also testified that later A.D. told her "daddy pinch" and "ear pinch" while grabbing her injured ear. An expert witness pediatrician testified that ears are very difficult to bruise in this manner without a lot of force and some type of pinching or pulling on the ears, and that such an injury would be painful. Additionally, the expert testified that the fact that both ears were bruised was indicative of abusive injury, as accidental injury would affect only one ear. The expert testified that this injury was inconsistent with Dixon's assertion that it occurred from biking in the wind or from wearing a tight helmet.

We conclude that when viewed in the light most favorable to the prosecution, this evidence was sufficient for the jury to find beyond a reasonable doubt that Dixon willfully caused A.D. to suffer unjustifiable physical pain as a result of a physical injury of a nonaccidental nature. *See* NRS 200.508(1); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (concluding that sufficient evidence supports a conviction where "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"); *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

Second, as to Count 3, Dixon argues that the State failed to present sufficient evidence that he knowingly delayed medical treatment and that this delay resulted in A.D.'s substantial bodily harm. At trial, the State presented evidence that A.D. suffered a serious brain injury on the morning of October 19, 2014, but that Dixon did not seek medical treatment for her until the following afternoon. Dixon told doctors who treated A.D. that she fell down the stairs but he did not see her hit her head. According to Dixon, A.D. appeared dazed immediately after the fall, and she became

less responsive as the morning progressed. Dixon put her down for a nap at 3 p.m., woke her up at 10 p.m., and after she played a little, she fell back to sleep until 4 a.m. the next morning. Around noon that next day, A.D. had become less responsive again, so Dixon laid her down for a nap. At 3 p.m., Dixon woke to A.D. vomiting and experiencing seizure-like symptoms, and he called 911 at 4:23 p.m.

A.D.'s mother testified that Dixon called her on October 19 while A.D. was napping but did not tell her about the fall. She testified that A.D. usually napped for only one to two hours. Dixon called her again on October 20 in the afternoon and told her that A.D. had fallen down the stairs and was not talking much, at which time she told Dixon to have A.D. checked on because something was not right if she was not talking.

The pediatric emergency physician who treated A.D. explained that A.D. had suffered from a subdural hematoma, (bleeding inside the skull) in addition to swelling in her brain. A neurosurgeon who later treated A.D. testified that A.D. was experiencing such an acute emergency by the time she got to him that he had to proceed to surgery immediately to avoid her death.

We conclude that when viewed in the light most favorable to the prosecution, the State presented sufficient evidence that a rational jury could have found that Dixon knew or should have known that A.D. required medical attention yet delayed seeking care. *See Jackson*, 443 U.S. at 319; *Origel-Candido*, 114 Nev. at 381, 956 P.2d at 1380; NRS 200.508. The evidence shows that after A.D. fell down the stairs, she was dazed, less responsive, not talking as much, and took a nap approximately five hours longer than normal. Additionally, he did not seek medical attention

immediately after A.D.'s mother told him that something was wrong, and Dixon waited a full hour after A.D. began vomiting to call 911.

We also conclude that the State presented sufficient evidence that Dixon's delay in seeking medical care resulted in substantial bodily injury. The expert witness doctor testified that any delay in treatment would cause further lack of oxygen to A.D.'s brain, collapse parts of the brain, and cause more swelling and a worse outcome. The neurosurgeon who operated on A.D. testified that he had to operate immediately to prevent A.D.'s death. Additionally, Dixon's expert witness doctor admitted that the delay of at least six hours between noticing symptoms to calling 911 would have led to a worse outcome for A.D. Thus, based on the evidence presented, we conclude that a rational juror could have found the essential elements of child abuse or neglect resulting in substantial bodily harm beyond a reasonable doubt. *See* NRS 200.508(1); *Rice v. State*, 113 Nev. 1300, 1309, 949 P.2d 262, 268 (1997) (concluding evidence supported the child neglect conviction where the defendant "knew or should have known that the infant was in need of medical care," she unreasonably delayed seeking it, and the delay caused unjustifiable physical pain or mental suffering), *abrogated on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006).

The district court did not plainly err in instructing the jury on child abuse or neglect based on delay in seeking medical treatment

Dixon next argues that the jury instructions were incomplete and did not correctly define medical neglect for Count 3. Specifically, Dixon argues that the district court had to instruct the jury that medical neglect requires that Dixon knew or should have known that A.D. had a serious injury requiring immediate medical attention, that Dixon delayed medical attention, and that the delay caused the substantial bodily harm to A.D. He

points to the jury's question during deliberation as to whether they had to consider only the injuries to A.D. or whether they were to consider what Dixon thought at the time he was in his apartment. And he asserts the court's response and jury instruction 6 did not accurately clarify the matter to the jury.

Dixon did not object to jury instruction 6 at trial, nor did he proffer any instruction of his own as to medical neglect. Because he did not raise this issue below, we review for plain error. *See Sanchez-Dominguez v. State*, 130 Nev. 85, 91, 318 P.3d 1068, 1073 (2014). "To establish plain error, an appellant must demonstrate that: (1) there was an error; (2) the error is plain, meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Flowers v. State*, 136 Nev. 1, 8, 456 P.3d 1037, 1045 (2020) (internal quotation marks omitted).

Relying on *Martineau v. Angelone*, 25 F.3d 734 (9th Cir. 1994), Dixon contends that NRS 200.508 required the jury to find not only that there was a delay between the injury and his attempt to seek medical care, but also that he knew or should have known during that time that A.D.'s injuries required medical attention. In *Martineau*, the Ninth Circuit analyzed NRS 200.508 and determined that a defendant's knowledge or imputed knowledge that the injuries required medical attention is a required finding for a child abuse conviction based on delay in seeking medical care. *Martineau*, 25 F.3d at 739. This court has also recognized that NRS 200.508 requires this mental state requirement for cases concerning the delay of medical treatment. *Rice*, 113 Nev. at 1307, 949 P.2d at 267.

We conclude that Dixon has failed to show that the jury instructions on the requirements for child abuse rose to the level of plain error affecting his substantial rights. We further conclude that despite not including an explanation of the "knew or should have known" mental intent standard as explained in *Martineau* and applied in *Rice*, jury instruction 6 does not rise to the level of plain error. Any potential error did not affect Dixon's substantial rights. Because we have already determined that a rational jury could have found that Dixon knew or should have known that A.D. required medical care, the jury would have convicted Dixon even with this mental state more thoroughly explained. Therefore, we conclude that the district court did not commit plain error by failing to include the requisite mental state in jury instruction 6.

The district court did not err by denying Dixon's proposed instruction on superseding intervening cause

Dixon argues that the district court erred by refusing his theory of defense instruction on superseding intervening cause. Dixon's proposed instruction read:

> The Defendant is guilty of the crime of Child Abuse and Neglect only if his behavior caused the substantial bodily harm to the child. If you believe that it was not his behavior that caused the harm, but that of another, superseding or intervening cause, then the Defendant is not guilty.
>
> An intervening cause means not a concurrent and contributing cause but a superseding cause which is itself the natural and logical cause of the harm. An act can only be a superseding cause if it is unforeseeable.

The court rejected Dixon's instruction, explaining that it was not a correct instruction on the law. We agree. As to superseding interviewing cause, we conclude that Dixon's instruction was misleading because it could have led the jury to inaccurately find that if A.D. was originally injured by falling down the stairs, Dixon's delay could not have been the cause of the harm. This is an inaccurate understanding of the law. Therefore, we conclude that the district court did not abuse its discretion by refusing Dixon's jury instruction. *See Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

The district court did not err by failing to instruct the jury on lesser-included offenses

Dixon next argues that the court's rejection of his above instruction improperly deprived him of the ability to instruct the jury on the lessor-included offense of "child neglect not resulting in substantial bodily harm." Dixon did not propose any instruction on the lessor included offense but asserts that his rejected instruction "essentially advised the jury on lesser-included offenses." Here again, we disagree. The jury was properly instructed on how to determine if Dixon was guilty of child abuse and neglect, and on how to determine if substantial bodily harm resulted from the child abuse. We conclude that because the jury instructions provided clear directions that allowed the jury to find Dixon guilty of child abuse with or without substantial harm, the district court did not abuse its discretion by rejecting Dixon's proposed instruction.

The district court did not plainly err by giving an incorrect verdict form

Dixon argues that the district court erred by giving a verdict form that incorrectly stated the charged crime. He specifically argues that the verdict form's phrasing of "child abuse, neglect, or endangerment *with* substantial bodily harm" as opposed to "*resulting in* substantial bodily

harm" eliminated the causation element from the jury's consideration. Dixon did not object to the verdict form at trial and thus we review for plain error. *Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015). We conclude that the district court did not give an incorrect verdict form because the "resulting in" language was supplied by an earlier jury instruction that adequately explained causation. Therefore, Dixon fails to demonstrate plain error.

The district court did not abuse its discretion in denying Dixon's for-cause challenge to a juror

Dixon argues the district court erred by denying his for-cause challenge to a prospective juror who was later empaneled. The juror acknowledged that she had experienced abuse as a child but stated that she would be able to set her memories aside and make a decision based solely on the evidence presented in the case. Dixon argues that the juror's nonverbal behavior, including a tremor in her voice, teary eyes, and her inability to unequivocally state that she could remain neutral demonstrated actual bias. Dixon had used all his peremptory challenges and was therefore unable to otherwise challenge the juror.

We defer to the district court on this issue and conclude that it did not abuse its discretion in denying Dixon's for-cause challenge to the juror. *Blake v. State*, 121 Nev. 779, 795, 121 P.3d 567, 577 (2005) (affording trial courts broad discretion in ruling on for-cause challenges). We have previously determined that the mere fact that a prospective juror was the victim of the same crime the defendant is charged with "does not, as a matter of law, disqualify her as a juror." *Hall v. State*, 89 Nev. 366, 370, 513 P.2d 1244, 1247 (1973). Rather, "[a] prospective juror should be removed for cause only if the prospective juror's views would prevent or substantially impair the performance of his duties as a juror in accordance

with his instructions and his oath." *Preciado v. State*, 130 Nev. 40, 44, 318 P.3d 176, 178 (2014) (internal quotation marks omitted). Here, the juror maintained that she would be able to be fair and follow the law and the court found her assertions satisfactory. Therefore, we conclude that the district court did not abuse its discretion in denying Dixon's for-cause challenge of the juror.

The district court did not err by admitting A.D.'s statement to a childcare worker

Dixon next argues that the district court erred by admitting A.D.'s statements "daddy pinch" and "ear pinch" to a childcare worker. Dixon argues that the admission of the statements runs afoul of the Confrontation Clause and NRS 51.385, which prohibits the inclusion of nontestimonial hearsay. We conclude that the testimony violates neither and was therefore properly admitted.

For out-of-court statements to implicate the Confrontation Clause, the threshold question is "whether the statement at issue is 'testimonial' hearsay." *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (quoting *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004)). Statements are testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006). This test requires an objective evaluation of the circumstances surrounding the statements and actions of the parties. *Michigan v. Bryant*, 562 U.S. 344, 359 (2011). A.D. was only two years old when she made these statements to the care worker, so it is extremely unlikely that she made them with any understanding of a future criminal prosecution. *See Ohio v. Clark*, 576 U.S. 237, 247-48 (2015) ("Statements by very young children will rarely, if ever, implicate the Confrontation Clause."). The care worker's questions to A.D.

were clearly within her line of work to protect the health, safety, and well-being of the children under her care. Although it was foreseeable A.D.'s statements could later be used in a prosecution, this was not the care worker's primary reason for questioning A.D., and it was certainly not A.D.'s primary reason for responding. Therefore, the admission of this evidence did not run afoul of the Confrontation Clause.

Nor did the admission of the statements violate NRS 51.385. The district court's admission of non-testimonial hearsay under NRS 51.385 is reviewed for an abuse of discretion. *Pantano v. State*, 122 Nev. 782, 790-91, 138 P.3d 477, 482-83 (2006). NRS 51.385 provides that a statement made by a child under the age of ten describing an act of physical abuse is admissible if the statement is deemed to be trustworthy. In determining whether the statement is trustworthy, the court should consider whether: "(a) [t]he statement was spontaneous; (b) [t]he child was subjected to repetitive questioning; (c) [t]he child had a motive to fabricate; (d) [t]he child used terminology unexpected of a child of similar age; and (e) [t]he child was in a stable mental state." NRS 51.385(2).

Dixon argues that the court created an arbitrary presumption that a two-year-old child is truthful without assessing the evidence. However, the record shows that the district court considered the trustworthiness factors and determined that (a) A.D.'s statements were not spontaneous, but (b) they were made only once in response to a nonrepetitive question, (c) A.D. had a loving relationship with her father and because of her age was unlikely to fabricate, (d) the phrases "daddy pinch" and "ear pinch" are simple phrases generally expected from the vernacular of a child her age, and (e) A.D. was a "normal child happy with life" with a bubbly personality and did not show signs of mental distress.

Because the record supports the district court's findings that the statements were trustworthy, we conclude that the court did not abuse its discretion in admitting A.D.'s statements.

The district court did not plainly err by permitting the jury to view video playback of trial testimony

Dixon next argues that the district court erred by permitting the jury to view a video, as opposed to a transcript, of Dixon and the care worker's trial testimony. However, Dixon did not object to this at trial and therefore we review for plain error. *Martinorellan*, 131 Nev. at 48, 343 P.3d at 593. Dixon cites no law in Nevada prohibiting video playback of trial testimony or favoring transcripts. Therefore, he fails to cogently argue that the district court's decision to allow the jury to view the video is clear error. Indeed, as technology evolves, we expect that the use of video playback of trial testimony may become more pervasive. We see no reason to disallow or otherwise restrict the use of this technology or impose a requirement that all video playback be transcribed.

NRS 200.508(1) is constitutional

Dixon next argues that NRS 200.508(1), which describes the elements of abuse, neglect, or endangerment of a child, and NRS 432B.140, which is incorporated into NRS 200.508, are unconstitutionally vague. NRS 200.508(1) prohibits willfully causing a child to "suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect." NRS 432B.140 states that negligent treatment includes subjecting a child to a lack of "medical care or other care necessary for the well-being of the child." Dixon argues that the statutes are vague because they do not define a lack of medical care or explain when such behavior becomes criminal.

As a preliminary matter, Dixon raises this argument for the first time on appeal; thus triggering plain error review. *Martinorellan*, 131

Nev. at 48, 343 P.3d at 593. This court has previously upheld NRS 200.508 and NRS 432B.140, as incorporated into NRS 200.508, as constitutional. *Smith v. State*, 112 Nev. 1269, 1276-79, 927 P.2d 14, 18-20 (1996), *abrogated on other grounds by City of Las Vegas v. Eighth Jud. Dist. Ct.*, 118 Nev. 859, 59 P.3d 477 (2002). In *Smith*, we concluded that these statutes were not unconstitutionally vague as applied with respect to "what physical condition of a child mandates intervention by a medical professional." *Id.* at 1278-79, 927 P.2d at 19-20. We held that a mother who failed to seek medical care for her child after learning that her boyfriend had hit the child causing bruising, vomiting, and a fever should have reasonably known that she criminally allowed her child to suffer physical pain or mental suffering. *Id.* at 1277, 927 P.2d at 19. Additionally, in *Smith* we determined that because the mother knew that her child's symptoms were serious and yet she intentionally did not seek medical care, NRS 432B.140, as incorporated into NRS 200.508, was specific enough to inform her that her failure to obtain medical care was criminal. *Id.*

Here, as in *Smith*, Dixon has failed to show that these statutes are unconstitutionally vague as applied to the facts of his case. The State presented sufficient evidence to show that Dixon should have known that A.D. required medical attention. As in *Smith*, there is sufficient evidence to support a verdict that Dixon knew or should have known that his child needed medical attention yet unreasonably delayed seeking out the same. Because we have previously considered the constitutionality of these statutes in a case that applies them in the same manner, we conclude that NRS 200.508 and NRS 432B.140 are not unconstitutionally vague.

Cumulative error does not warrant reversal in this matter

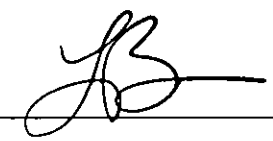
Lastly, Dixon argues that cumulative error warrants reversal of his convictions. Because we find no errors in the District Court's rulings, there are no errors to cumulate. *See Rose v. State*, 123 Nev. 194, 211-12, 163 P.3d 408, 420 (2007). Therefore, we conclude that cumulative error does not warrant reversal in this matter.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Herndon

_____, J.
Lee



_____, J.
Bell

cc: Hon. Jacqueline M. Bluth, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County District Attorney/Juvenile Division
Eighth District Court Clerk